

NON-WESTERN PHILOSOPHIES OF LAW

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Summary

This article provides an overview of the world's major legal traditions apart from the two commonly described as "Western" – the common law and civil law traditions. All human societies require mechanisms for rule-making, rule enforcement and dispute resolution, and all human societies more complex than the smallest hunter-gatherer bands require some formalized system of law to embody these mechanisms. In the days before European colonialism, divergent legal traditions evolved in the Americas, Asia and Africa.

European colonial rule and influence brought the two major European legal traditions to most of the world. In some areas these traditions have wholly supplanted indigenous traditions, while in other areas mixed systems have evolved. In some areas the European traditions never took root or have since been supplanted by the resurgence of pre-colonial traditions.

This article explores examples of each of these. In much of the Islamic world, systems incorporating elements of Islamic and European traditions exist. In other countries, though, the Islamic law, *shari'a*, provides the sole legal tradition, or nearly so. In India, much of Africa and some parts of Latin America, indigenous legal traditions exist side by side with European traditions. In India, for example, matters concerning family law and property ownership are determined by the laws of the various religious communities. In many countries in Africa traditional law often governs such matters; in some countries the role of traditional law at the community level is formally recognized by the national government, while in others it results from the incomplete spread of the national government's European-derived system. In Latin America the role of traditional law is smaller and more often visible through its influence on national legal

systems than as a separate tradition. In East Asia, as well, the legal systems are mostly derived from European systems, but countries in the region have added to and developed those systems.

1. Introduction

To some extent the title of this article is inaccurate. The very word “Western” is a vestige of colonialism, and reflects archaic and outmoded concepts. “Western” is commonly used to refer to legal and social systems having their origin in Europe, particularly Western Europe. At one time, when such systems were confined to Europe, the designation made a certain amount of sense. Europe is essentially a large peninsula tacked on to the western end of Asia, inhabited by numerous warring tribes with a history of episode after episode of warfare, genocide and internecine conflict.

Perhaps as a result of this intense competition for national, tribal and individual survival, Europe was the first of the world’s regions to industrialize on a large scale. During the late pre-industrial and industrial periods, European nation-states, most notably Spain, Portugal, Britain and France, managed to conquer most of the world by a combination of military force, trade, subterfuge and diplomacy. As a result most of the world is now to some degree “Westernized,” as are most of the world’s legal systems.

Among the less important colonial legacies is a vocabulary of now geographically meaningless terms such as “Western.” To the inhabitants of North and South America, for example, it makes no sense to refer to East Asia as “the Far East,” or even as “the East.” China, Japan, Singapore and Australia lie to the west of Canada, the United States, Ecuador and Peru; it is Europe and Africa that should properly be referred to as “the East.”

Such oddities are not particularly important in themselves, but they are indicative of the distortions wrought by colonialism in all areas of life. Legal systems were one of the many areas of pre-existing cultures to be affected, in degrees ranging from complete replacement of the indigenous system to a mild overlay of European terminology and trappings on an essentially traditional set of structures and functions.

Two European systems of law were exported throughout the world: the English common-law system, and several variants of the civil law system. These are discussed in detail in *Western Philosophies of Law: The Civil Law* and *Western Philosophies of Law: The Common Law*.

Indigenous systems survived in varying degrees throughout the world. In areas such as the continental United States and Canada they were almost entirely supplanted and today their influence is visible, if at all, largely in the practice of Native American courts, and affects only a small segment of the population. Even countries that were themselves never colonized have often adopted legal systems based on the civil law. In most countries traditional legal systems survive only in certain areas of the country (usually rural), in certain areas of law (especially family law and property law), or both. One notable exception is the Shari’a, or Islamic law, which not only survived European colonial rule in many countries but is enjoying a resurgence throughout the Islamic

world. Other systems that, like Shari'a, include a substantial religious element are found in a variety of countries, including India and Israel.

2. Islamic Law

Of the non-Western systems of law, Islamic law is the most vital and potentially the most influential. Unlike many traditional systems that are gradually being replaced by the civil law or are limited to one geographic area, Islamic law's influence is growing in many countries in Europe, Asia and Africa. Yet Islamic law is poorly understood in the "West," which is perhaps less surprising when one considers how little most lawyers in common law countries know of the civil law, and vice versa.

Perhaps the most common misconception about Islamic law is that it is identical to the law of Muslim countries. Dozens of countries have a population the majority of whom follow Islam, and dozens more have sizable Muslim minorities. Yet many of these countries are completely secular states, often with legal systems following the civil law tradition. Many others declare themselves to be Islamic states, yet continue to apply a secular system of law, often based upon the civil law. Dual systems of law are common; for example, in many countries matters of family law, property rights and inheritance are decided according to Islamic law, while matters involving contracts, corporations and the like are dealt with according to secular law. A dual court system is also common: Religious judges (*qadis*) apply Islamic law, while secular judges apply secular law.

Many religious systems of law, and in particular the Islamic law, are distinguished from secular systems by two characteristics: immutability and embeddedness. The Shari'a is the divinely revealed law of Islam; in becoming a Muslim, one submits oneself to the rule of Shari'a. The underlying text of Shari'a is the Qur'an, which is immutable. The Qur'an is also the underlying text of Islam, and thus the law and the religion are inextricably linked; there is a high degree of embeddedness of law in the religion or, from a lawyer's perspective, of religion in the law.

The three sources of Islamic law are the Qur'an, the *Sunna* and the *ijma*. The Sunna contains the *hadeeth*, or the record of the acts, statements and life of the Prophet Mohammed. The *ijma* is that body of law agreed on by past Islamic legal scholars and recorded in books of *fikh* (law), used by *qadis* in deciding cases.

In contrast to many other non-Western legal traditions, Islamic law thus offers a substantial body of texts and recorded interpretations easily accessible to Western lawyers. Yet these texts are rarely studied in "Western" law schools; American textbooks on comparative law tend to focus largely or exclusively on the civil law tradition. It is to be hoped that the growing importance to the West of relations with the Islamic world will lead to an increased focus on the teaching and understanding of Islamic law.

3. Hindu Law

Hindu law is also globally significant in terms of the number of people whose lives are

in some way governed by it. As with Islamic law, it is the law applied to some areas of the lives of adherents of a particular faith, and those adherents are spread throughout the world. In contrast to Islamic law, however, the majority of those adherents live in a single country: India.

Here arises a common misunderstanding, similar to that often encountered regarding Islamic law. Hindu law is not the law of India. India is a secular, pluralist state, with a population composed of many religious groups, although the majority are Hindus. India's legal system is part of the common law tradition. However, under the secular laws of India, Hindus are governed in certain areas, especially those relating to family matters, property rights, inheritance and the like, by Hindu law. Similar provisions are made for the traditional legal systems of other religious communities in India. For example, the Indian Succession Act does not apply to Hindus, Muslims, Buddhists or Parsees; instead, each of these communities is governed by its own laws regarding succession. Some areas of the Hindu law have been codified in the Hindu Code, while others remain a matter of traditional law.

In some areas of law the secular laws of India are in direct conflict with traditional Hindu law. This is particularly evident in the case of the Hindu Marriage Act. The act requires the wife's consent to the marriage, forbids polygamy, and permits divorce. The related Special Marriages Act gives legal validity to marriages between Hindus and non-Hindus. Perhaps nowhere is the conflict between religious and secular conflict more evident than in the ongoing efforts of the secular Indian government to abolish the caste system, which nonetheless remains embedded in the consciousness and way of life of the majority of the Hindu population.

For the foreigner doing business in India, the reach of Hindu law is far less evident than is the reach of Islamic law in the Islamic world. For the majority of Hindus, however, especially those who live in rural areas, the Hindu legal tradition is likely to constitute most or all of their experience with law.

4. Pre-Colonial Legal Traditions in Africa and the Americas

All societies require dispute resolution mechanisms. In any sufficiently developed society, these mechanisms will be formalized in some way. At some point their administration will require a professional legal class, written records of the law, and the other trappings generally associated with legal systems.

The indigenous civilizations of Africa and the Americas possessed systems for dispute resolution prior to the invasions of European colonialists in the fifteenth through nineteenth centuries. The extent to which these systems survived depended on the degree to which they had been formalized and recorded and the intensity of the colonialist onslaught upon the existing legal traditions.

In North America, for example, where the level of formalization of most systems was low and the colonialist onslaught in many areas amounted to ethnic cleansing or genocide, very little remains of traditional dispute resolution mechanisms. Native American law in the United States and Canada is detectable through its influence on the

theorists, among them Thomas Jefferson and Benjamin Franklin, responsible for creating those countries' legal systems, rather than through direct incorporation into the legal systems of those countries.

Native American tribal courts do continue to apply traditional rules of law to some disputes, although only a fraction of a percent of the inhabitants of the United States and Canada fall within the jurisdiction of such courts.

In Latin America the situation is somewhat different. The highly organized pre-colonial societies of the Aztecs, Incas, Zapotecs, Maya and others had formalized legal systems, with established procedures for trials and, especially in the case of the Aztecs, a professional legal class, the *tepanlatoanis*. The Aztec empire also possessed a variety of courts of specialized jurisdiction; for example, commercial courts had jurisdiction over individual markets, and heard cases involving commercial disputes and theft. There were also tax courts, military courts, and family law courts. Trials were formally conducted; while most proceedings were conducted orally, written evidence was used and written records were at least sometimes created.

After the Spanish conquest of Mexico, indigenous law, where not incompatible with Spanish interests, was preserved and in 1680, recompiled; during the colonial era these laws were applied by special "Indian courts." Traditional law still survives as a dispute resolution mechanism in many rural communities, but it is also strikingly evident in its influence on the development of contemporary legal systems in many countries. In Mexico, for instance, the laws regarding communal lands (*ejidos*) provide a particularly clear example.

For the most part Africa's colonial experience lies in the more recent past than Latin America's, and most African countries were less completely colonized. As a result, indigenous legal traditions are much easier to discern in Africa. Tribal law often governs all "traditional" matters – matters relating to family, personal property and the like – and in many rural areas is the only law.

In some countries, such as South Africa, the official recognition accorded to traditional law has come under attack from feminists, who point out that traditional legal systems often accord far fewer rights to women than systems derived from colonial models. Although similar arguments might be raised in many areas of the world, it is in Africa, and particularly South Africa, that this viewpoint has been particularly widely expressed. Property rights, marriage, divorce, inheritance, domestic violence and rape are all matters with regard to which some South African feminists have said that "traditional law is men's law."

5. Traditional Influences on Modern Law in East Asia

Many of the major countries of East Asia, among them China, Japan, Korea, Mongolia and Thailand, were never colonized by European powers, although China was subjected to numerous infringements on its sovereignty, Korea and parts of China were ruled by Japan, and Mongolia was ruled for many decades by a Soviet-backed socialist government. All of these societies have highly complex histories of rulemaking and

dispute resolution, and it might be expected that they would, like the Islamic world, exhibit legal traditions strikingly different from those of the “West.”

This is not the case, however. While, for example, elements inspired by traditional Buddhist law may be detected in the legal codes and practice of Thailand, and Confucian traditions may be detected in Korea, they are no more evident than the Aztec elements in modern Mexican law, and perhaps less so. Indeed, the search for such traditional bases in these legal systems would seem to be far more interesting to Westerners than to legal scholars in Thailand or Korea. Mongolia has redesigned its formerly socialist legal system with the help of American lawyers. Over a century ago Japan imported a civil code based on the German model, and it is now governed by a constitution imposed by and largely drafted by Americans after World War II.

Part of the problem may be, again, with the underlying inaccuracy of the concept of “the West.” These East Asian countries are, for the most part, more fully integrated than, for example, many African countries. There is homogeneity of law throughout the national territory, the population is for the most part fully integrated into the economic life of the country, and the countries themselves are fully integrated into the global economic system. Thus, it is not that the legal systems of the nations of East Asia have become “Westernized.” Rather, the term “Western” has become meaningless; there is no more “West.” Japan, China and the other nations of East Asia are as influential a part of the international economic and political system as are the nations of Europe and North America. It would be as accurate, or inaccurate, to speak of the Westernization of East Asia as of the Easternization of Europe and North America. What has happened instead is internationalization; the legal systems of “East” and “West” have gradually grown together.

6. Conclusion: The Future of Distinct Legal Traditions

The preceding observations are not meant to suggest that such a growing together is inevitable; but for secular legal systems, there is no immutable underlying basis that can not be deviated from, and when the interests and experiences of countries converge, their legal systems are likely to do so as well. On the other hand, when their interests diverge, new legal traditions may come into existence. The twentieth century saw the rise and fall of such a legal tradition: The socialist tradition had its roots in the civil law tradition, but, with the spread of the socialist form of government throughout the world, it emerged as a distinct “Western” tradition of law. The events of 1989 and the early 1990s have now led to the near-total demise of this tradition, although it persists in a few countries. Others have been or are gradually being reunited with the civil law tradition.

As the interests of states diverge in the future, other new legal traditions may emerge. Independent legal traditions such as the Islamic tradition will continue. At the same time, increasing trade will bring differing legal traditions into increased contact with one another. Thus, the study of alternative legal traditions will be increasingly important for lawyers, lawmakers and scholars in the coming years.

Glossary

- Civil law:** any of a group of legal systems having its origin in the Roman law, or the law of any jurisdiction employing such a system
- Colonialism:** a policy by which a nation maintains or extends its control over foreign lands and peoples
- Common law:** any of a group of legal systems having its origin in the English law, or the law of any jurisdiction employing such a system, or a body of law derived from judicial decisions
- Family Law:** the body of law dealing with relationships between family members, especially spouses and parents and children, including (but not limited to) the laws of marriage, divorce, adoption, legitimacy, child custody, and child support
- Legal Tradition:** in this context, a group of national legal systems sharing common intellectual and philosophical underpinnings and a common set of legal customs and usages
- Shari'a:** the revealed and the canonical laws of the religion of Islam, as well as rules and regulations made by a government within the scope and dimensions of the Qur'an and the Sunnah of the Prophet Mohammed

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Biographical Sketch

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